UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRTIETH REGION

In the Matter of :

CASE NO. 30-CA-078663

WOODMAN'S FOOD MARKET, INC.

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And :

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UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1473

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REPLY TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF

FRED B. GRUBB & ASSOCIATES, LLC Representative of Woodman's Food Market, Inc. TD Banknorth Building 10 South Main Street Waterbury, VT 05676

I. INTRODUCTION¹

The Administrative Law Judge (ALJ) erred in finding that Mr. Wydeven was both a supervisor and agent of the Respondent. The General Counsel only examined one witness on the stand – a witness whom the ALJ and General Counsel believe is thoroughly discredited. As there was no credible testimony, according to the ALJ's own ruling, the burden was unlawfully shifted to the Respondent to prove that Mr. Wydeven was not a supervisor/agent – even though no credible testimony had been offered by the General Counsel establishing even a prima facie case. The ALJ ignored clear testimony and documentary evidence establishing that Mr. Wydeven did not effectively recommend discipline and did not effectively recommend employees pass probation. Further, the ALJ and General Counsel have erred by incorrectly applying several cases as discussed below.

II. UNLAWFUL SHIFT OF BURDEN TO EMPLOYER

It is not in dispute that the burden of proving supervisory or agency status lies with the General Counsel. The General Counsel entered into evidence several company documents. It seems very basic to say that documents need to be explained – and they need to be explained by the party whose burden it is to prove Mr. Wydeven's status. The General Counsel **never** adequately explained the documents entered into evidence. This is obvious to even a casual observer of the Hearing because, according to the ALJ, there was no credible testimony offered by the General Counsel. The General Counsel's only witness was discredited – therefore no

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¹ The General Counsel's Answering Brief was 29 pages long and contains so many mischaracterizations of the Respondent's position, and incorrect application of Board law, that the severe page limitation of this Reply Brief makes it impossible to respond to each and every inaccuracy. The Respondent stands by their Brief in Support of Exceptions as the full explanation of their position. This Answering Brief merely responds to the most egregious of the General Counsel's errors and highlights for the Board the key overall issue that whether Mr. Wydeven is credible as a witness or not the ALJ's decision must be reversed.

credible explanation of the documents has been offered by the party who is responsible to explain them.

The ALJ clearly believes that Mr. Wydeven is not credible in his testimony. The following statements are from the ALJ's Decision: "I do not credit this uncorroborated testimony". (ALJD 4). "Wydeven did not impress me as a credible witness generally." (ALJD 5). "His testimony at times seemed rehearsed, and he became noticeably nervous when asked about certain subjects". (ALJD 5). "I am convinced that his testimony in this respect (and other respects as discussed below) was neither truthful nor entirely true". (ALJD 5). "I do not credit this uncorroborated testimony". (ALJD 6).

With no credible testimony the General Counsel is left with only unexplained documents. If you believe Mr. Wydeven's testimony then the General Counsel has not proven his case.

However, the opposite of this statement is not true. In other words, if you do not believe Mr.

Wydeven's testimony then the General Counsel has proven his case. This is obviously incorrect but nonetheless what the General Counsel and ALJ wish us to believe.

Interestingly enough, the ALJ makes exactly this point when referring to two performance evaluations entered into evidence by the Respondent. These two performance evaluations prove — by their mere existence — that the company has a practice of having non-supervisory personnel fill out and sign evaluations. Even so, the ALJ on page 9 of his decision said the following: "Although the General Counsel has the burden of proof, the Company introduced the 2010 evaluations, which came from its own personnel records. Thus, the Company bears the burden of persuading that the evidence is relevant, material and significant…" (emphasis added). It is therefore also true that the General Counsel bears the burden of persuading that the evidence it submits is relevant, material and significant. With only one witness, whom the ALJ

believes is thoroughly discredited, it is therefore axiomatic to say that there was no credible explanation of any documents given by the General Counsel.

The General Counsel, apparently understanding the weakness of providing no credible testimony, cites on several occasions that the company documents speak for themselves and are not mere "words on paper". However, the Board recognizes that which is so basic it hardly needs to be said – that documents need explanation and context to be understood.

The ALJ accepted conclusory statements from company documents such as the fact that Mr. Wydeven's "responsibilities include directing the workforce", that he is "in charge of the Auto Center, and that he has the "ability to direct the workforce". By themselves these are the kinds of conclusory statements the Board has clearly rejected in determining supervisory status. *A and G, Inc., d/b/a Alstyle Apparel and UFCW Local No. 324* 351 NLRB No. 92 (2007). "However, conclusory statements, without supporting evidence, are insufficient to establish supervisory status and authority." *American Directional Boring, Inc., d/b/a/ ADB Utility Contractors, Inc. and Local 2 IBEW* 2007 WL 2430006. The ALJ recognizes that the Respondent must have credible explanations for the documents it enters into evidence but does not extend this same view to the General Counsel. The Board, however, understands that without explanation the documents do not "speak for themselves" to the extent of proving the totality of the General Counsel's case without any explanation as to their relevance and significance.

The ALJ looks to these documents and then expects the Respondent to offer counter evidence and witnesses to refute what has not yet been credibly established. A central question in this case has become what does "burden" mean? Surely, at the very least, it means that the General Counsel is required to offer credible explanations for his theory of what the documents mean. In destroying the credibility of the only witness the ALJ has eviscerated the General Counsel's

case. The Respondent rested at the conclusion of the General Counsel's case because they believe the testimony of Mr. Wydeven. With no credible testimony the General Counsel is left with conclusory statements already rejected by the Board. The Respondent was absolutely correct in its decision to rest because the law does not require it to prove that Mr. Wydeven is not a supervisor when the General Counsel has put on an incomplete case.

III. MISAPPLICATION OF BOARD DECISIONS

The General Counsel incorrectly cites Pacific Coast M.S. Industries, 355NLRB 1422, 1423 (2010) in support of his position. On page 17 of his Answering Brief he correctly states that the authority to evaluate is not a primary indicator of supervisory status. In some cases the Board will consider it as a primary indicator if the evaluation itself leads directly to an effect of wages and/or job status. However, it is important to understand the context of the decision in *Pacific* Coast. In their decision the Board stated: "Lead employees in most circumstances are trusted employees. Their observations are valued. Even so, their observations do not amount to "effectively recommending" the hire of anyone. They simply provide information which is taken into account...". The Board further states: "The recommendation choices at the bottom of the evaluation form are little more than the tail on the dog. While they are the opinions of the evaluator, they do not constitute the independent judgment or the "effective" recommendation the statute contemplates for 2(11) supervisor status." These statements by the Board are relevant to the case at hand in two very important ways. First, it shows that documents, particularly evaluations, do not "speak for themselves" in the way the ALJ and General Counsel argue. These documents require credible explanations by the party bearing the burden of proof. Second, it shows that being a trusted employee who makes observations about the performance

of others, as in the case of Mr. Wydeven, does not make that person a supervisor or agent of the employer.

The General Counsel incorrectly cites Williamette Industries, 336 NLRB 743, 744 (2001) in support of his position on page 17 of his Answering Brief and neglects to mention the context of the decision. In Williamette the two employees in question complete weekly evaluations of probationary employees (obviously using their own judgment and observations as the General Counsel mentions several times in his Brief and during the Hearing). The Board states: "Although the evaluations contain space for a recommendation as to whether the probationary employee should be retained, there is no evidence indicating what weight, if any, those recommendations carry in the Employer's personnel decisions". In the case of the evaluations filled out by Mr. Wydeven both before and after he became the Auto Center Manager there was also a box to check whether or not the employee should pass or not pass probation. It is not in dispute that Mr. Wydeven did not have the authority to check this box.² The General Counsel provided no evidence indicating the weight given to Mr. Wydeven's observations – clearly in contradiction to the Board's will as stated in Williamette. As in the case of the two employees in Williamette the correct application of Board precedent would be to find that Mr. Wydeven was neither a supervisor nor an agent of the Respondent.

The General Counsel incorrectly cites *Venture Industries, Inc.*, 327 NLRB 918, 919 (1991) in support of his position on page 19 of his Answering Brief and neglects to mention the context of the decision. The General Counsel states "the Board does not require that the employer follow the recommendation of the purported supervisor in each instance...". The Board stated in

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² The General Counsel could argue that Mr. Wydeven's testimony on this point is not to be believed. However, if that is the case then the General Counsel has no evidence at all to suggest that Mr. Wydeven checked the box as he called no one else to testify and the document itself does not tell us who checked which box.

Venture Industries that the alleged supervisor in question had the authority to issue oral and written reprimands concerning production and attendance. Further, the Board stated:

"When a supervisor decides to issue a reprimand, he discusses it with the employee, has the employee sign it, and then sends it to the human resources department to be placed in the employee's personnel file. It is also undisputed that the Employer has a progressive disciplinary system, and that, pursuant to that system, the department and line supervisors have the authority to recommend that an employee be suspended."

In other words, the Board has ruled that when a supervisor already has the authority to issue written reprimands, and already has the authority to suspend an employee, the Board, in this limited case, will not require that the supervisor's recommendation for suspension be followed in every instance. The General Counsel did not offer evidence or prove that Mr. Wydeven has the authority to issue written reprimands or to suspend employees. The correct application of *Venture Industries* would be to find that Mr. Wydeven is neither a supervisor nor agent of the Respondent.

The General Counsel incorrectly cites *Progressive Transportation Services, Inc.*, 340 NLRB 1044, 1045 (2003) in support of his position on page 19 of his Answering Brief and neglects to mention the context of the decision. Specifically, the General Counsel fails to mention that the alleged supervisor's recommendations for discipline had been followed 33 times. It is not surprising that the Board would rule that one instance out of 33 would not negate the supervisory status of an individual. In the case of Mr. Wydeven the General Counsel only offered one instance of a disciplinary action and presented no credible testimony as to whether or not Mr. Wydeven made any recommendation at all.³

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³ Of course, if Mr. Wydeven is to be believed all he did was sign the action. If he is not to be believed then there was no testimony on point at all provided by the General Counsel.

IV. GENERAL COUNSEL MISCHARACTERIZES RESPONDENT'S POSITION REGARDING AGENCY STATUS

In footnote 23 of his Answering Brief the General Counsel states: "Respondent appears to suggest the ALJ erred in finding that Mr. Wydeven was not part of the unit." Respondent made no such suggestion and does not dispute in any way that Mr. Wydeven was not part of the unit.

It is the ALJ who cited *Comau, Inc.*, 358 NLRB No. 73 (2012) as the basis for his finding agency status given that the position is not in the bargaining unit. Although, as the General Counsel correctly stated in his Answering Brief, the facts in *Comau* are different than in this case, the point of the Board's decision is that other employees believed that the alleged Agent was acting on behalf of management in large part because he was not in the bargaining unit. The ALJ has absolutely no idea why Mr. Wydeven's position was excluded from the bargaining unit in 2009 based on what was presented by the General Counsel in the Hearing. The ALJ is making the erroneous assumption that the reason for the exclusion is that the parties agreed the Auto Center Manager position was supervisory. Further, as it relates to *Comau*, the ALJ is making another assumption that employees would view the position as aligned with the Employer because it was not in the unit. These are assumptions wholly unsupportable by any testimony or documentary evidence.

Mr. Wydeven testified that he believed himself to be in the union and that he was paying union dues. (Tr. 89: 1-2). The Decision and Direction of Election in 30-RD-1488 was not being offered to prove in any way whether or not Mr. Wydeven is an agent of the Respondent. As it was a decision that affected the same position in another store in Wisconsin it is not unreasonable to assume that employees in the Appleton store would believe that this position was also not in the bargaining unit. The Board in *Comau* cares what other employees believe regarding whether or not a position is in the bargaining unit. Once again, the General Counsel

entered into evidence an agreement between the Respondent and the union with no explanation. It is clearly reversible error for the ALJ to rely so heavily on a document with no testimony whatsoever to explain its context or its meaning.

V. CONCLUSION

The General Counsel believes the Respondent's argument is that Mr. Wydeven is credible and cites *Standard Drywall* in support of his rejection of this position. This is a mischaracterization of the Respondent's position. Their position is thus: **It does not matter whether or not Mr. Wydeven is credible**. If he is credible then the General Counsel obviously did not prove that his position is that of a supervisor or agent. If he is not credible then the General Counsel's case is woefully incomplete with no credible testimony and only unexplained documents containing, at best, conclusory statements already rejected by the Board. It is clear that the General Counsel did not meet his "burden of proof" and that the ALJ's decision should be rejected in its entirety.

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served a copy of the within and foregoing "Reply To Acting General Counsel's Brief" upon the Board using the E-Filing system.

This is also to certify that I have on this day served a copy of the within and foregoing "Reply To Acting General Counsel's Brief" via email upon the parties as follows:

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This 20th day of November, 2012.

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